

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

PUBLIC EMPLOYEES FOR
ENVIRONMENTAL RESPONSIBILITY,
962 Wayne Ave, Suite 610
Silver Spring, MD 20910

Plaintiff,

v.

UNITED STATES OFFICE OF
PERSONNEL MANAGEMENT
1900 E Street NW,
Washington, DC 20415

Defendant.

CIVIL ACTION NO. 1:18-cv-2765

COMPLAINT

PRELIMINARY STATEMENT

1. Plaintiff Public Employees for Environmental Responsibility (“PEER” or “Plaintiff”) brings this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et seq.*, as amended, to compel the United States Office of Personnel Management (“OPM” or “Defendant”) to disclose records wrongfully withheld in failing to respond within the statutory deadline to Plaintiff’s FOIA request.
2. Plaintiff is a non-profit organization dedicated to research and public education concerning the activities and operation of federal, state, and local governments.
3. On July 6, 2018, Plaintiff submitted a FOIA request, attached as Exhibit A, seeking records related to OPM’s rationale for changing the definition of “senior leaders” for the 2018 Federal Employee Viewpoint Survey (“FEVS”).
4. On July 13, 2018, Defendant requested that Plaintiff specify a timeline for item (1) of Plaintiff’s FOIA request.

5. On July 13, 2018, Plaintiff responded, specifying a start date of January 1, 2017 up to the finalization of the FEVS 2018 survey.
6. On August 6, 2018, Plaintiff received a letter from Defendant acknowledging receipt of Plaintiff's FOIA request, attached as Exhibit B.
7. The FOIA requires federal agencies to respond to public requests for records, including files maintained electronically, to increase public understanding of the workings of government and provide access to government information. FOIA reflects a "profound national commitment to ensuring an open Government" and agencies must "adopt a presumption in favor of disclosure." Presidential Mem., 74 Fed. Reg. 4683 (Jan. 21, 2009).
8. The FOIA requires agencies to determine whether to comply with a FOIA request within twenty working days after its receipt. 5 U.S.C. § 552(a)(6)(A)(i). In "unusual circumstances," the agency may extend this time period for a maximum of ten working days. 5 U.S.C. § 552(a)(6)(B)(i).
9. Administrative remedies are deemed exhausted when an agency fails to comply with the applicable time limits of the FOIA. 5 U.S.C. § 552(a)(6)(C)(i).
10. Plaintiff now seeks an order from this Court requiring Defendant to immediately produce the records sought by Plaintiff's FOIA request, as well as other appropriate relief, including attorneys' fees and costs.

JURISDICTION AND VENUE

11. This Court has jurisdiction over this action under 5 U.S.C. § 552(a)(4)(B). This Court also has federal question jurisdiction over this action under 28 U.S.C. § 1331.

12. This Court has the authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*
13. This Court is a proper venue because Defendant is a government agency that resides in the District of Columbia. *See* 28 U.S.C. § 1391(e)(1)(A) (where defendant is the government or a government agency, a civil action may be brought in the district where the defendant resides). Venue is also proper under 5 U.S.C. § 552(a)(4)(B) (providing for venue in FOIA cases where the plaintiff resides, where the records are located, or in the District of Columbia).
14. This Court has authority to award reasonable costs and attorneys' fees under 5 U.S.C. § 552(a)(4)(E).

PARTIES

15. Plaintiff, PEER, is non-profit public interest organization incorporated in Washington, D.C. and headquartered in Silver Spring, Maryland, with field offices in Florida, Massachusetts, and Tennessee.
16. Among other public interest projects, PEER engages in advocacy, research, education, and litigation to promote public understanding and debate concerning key and current public policy issues. PEER focuses on the environment, including the regulation and remediation of toxic substances, public land and natural resources management, public funding of environmental and natural resource agencies, and ethics in government. PEER educates and informs the public through news releases to the media, through its website, www.peer.org, and through publication of the PEER newsletter.
17. Defendant, OPM, is an agency of the United States as defined by 5 U.S.C. § 552(f)(1).

18. Defendant is charged with the duty to provide public access to records in its possession consistent with the requirement of the FOIA. Here, Defendant is denying Plaintiff access to its records in contravention of federal law.

STATEMENTS OF FACT

19. Every year since 2002, the OPM has conducted a FEVS, the results of which gauge employee morale, engagement, and perceptions about their departments. The survey asks questions about “senior leadership” such as –
- a. “How satisfied are you with the policies and practices of senior leaders”
 - b. Do you “have a high level of respect for your senior leaders”
 - c. Do your “senior leaders maintain high standards of honesty and integrity”
20. The definition of “senior leaders” in FEVS from 2002-2017 was: “The heads of departments/agencies and their immediate leadership team responsible for directing the policies and priorities of the department/agency. May hold either a political or career appointment...”
21. The definition of “senior leaders” in the 2018 FEVS was: the “*nearest* senior executive (SES, Director, or higher-level GS) in your organizational structure...” (Emphasis added).
22. On July 6, 2018, Plaintiff submitted a FOIA request, attached as Exhibit A, seeking (1) Any OPM rationale for this definition change circulated both internally or to other federal agencies; and (2) A copy of each email in the account of the following 13 OPM officials: Kimberly Wells, Survey Analysis, Office of Strategy and Analysis; Lance Harris, Data Analysis, Office of Strategy and Analysis; Kinya Lee, Senior Advisor on Research and Evaluation; Jozette R. Robinson, Executive Secretary and Research Management Officer;

Stephen D. Hickman, Deputy Executive Secretary; Kathleen McGettigan, Chief Management Officer; Kathleen M. Bullock, White House Liaison; Stephen M. Billy, Deputy Chief of Staff; Michael D. Dovilla, Chief of Staff; Michael J. Rigas, Deputy Director; Timothy J. Duffy, Special Assistant to the Deputy Director; Jeff T.H. Pon, Director; and Mary E. Anderson, Special Assistant to the Director.

23. Plaintiff limited item (2) of the FOIA request to emails containing the words “change,” “changes,” “modify,” “modification,” “modifications,” “definition,” “leadership,” or “senior” during the period of January 1, 2018 to the present.

24. On July 13, 2018, Defendant contacted Plaintiff by email, seeking a timeframe for item (1) of Plaintiff’s FOIA request.

25. In response, on July 13, 2018, Plaintiff limited item (1) of the FOIA request to January 1, 2017 through the finalization of the 2018 survey containing the revised definition.

26. On August 6, 2018, Defendant acknowledged receipt of Plaintiff’s FOIA request. See Exhibit B. Defendant placed Plaintiff’s FOIA request in the complex processing track, requiring more than 20 workdays to respond.

27. As of the date of this filing, November 27, 2018, it has been 77 “working days” from the date of Defendant’s acknowledgment of Plaintiff’s FOIA request on August 6, 2018.

28. As of this filing, Defendant has not indicated that any “unusual circumstances” exist regarding Plaintiff’s FOIA request.

29. As of this filing, Defendant has failed to make a determination on, or produce any documents in response to Plaintiff’s FOIA request, Case Number 2018-07948.

30. Administrative remedies are deemed exhausted when an agency fails to comply with the applicable time limits. 5 U.S.C. § 552(a)(6)(C)(i). Having fully exhausted its

administrative remedies for its June 26, 2017 FOIA request, PEER now turns to this Court to enforce the FOIA's timely guarantee of public access to agency records, along with the remedies available when an agency withholds that access.

CAUSE OF ACTION

Violation of the Freedom of Information Act

31. Plaintiff incorporates and restates the allegations of the preceding paragraphs.
32. Defendant's failure to disclose the records requested is a wrongful withholding of records in violation of FOIA, 5 U.S.C. § 552, and OPM regulations promulgated thereunder, 5 C.F.R. § 294.100 *et seq.*
33. Plaintiff now seeks an order from this Court requiring Defendant to immediately produce the records sought in Plaintiff's FOIA request, as well as other appropriate relief, including attorneys' fees and costs.

RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully requests that this Court:

- i. Enter an order declaring that Defendant wrongfully withheld requested agency records;
- ii. Issue a permanent injunction directing Defendant disclose to Plaintiff all wrongfully withheld records;
- iii. Maintain jurisdiction over this action until Defendant is in compliance with the FOIA and every order of this Court;
- iv. Award Plaintiff attorney fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E); and
- v. Grant such additional and further relief to which Plaintiff may be entitled.

Respectfully submitted on November 27, 2018,

/s/Paula Dinerstein

Paula Dinerstein, DC Bar # 333971

Public Employees for Environmental Responsibility

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Counsel for Plaintiff